RECORD
AND
BRIEFS

No. 15-1293

In the

Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE

Petitioner,

v.

SIMON SHIAO TAM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, HISPANIC NATIONAL BAR ASSOCIATION, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, NATIONAL BAR ASSOCIATION, NATIONAL LGBT BAR ASSOCIATION, AND NATIONAL NATIVE AMERICAN BAR ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 4

Argument 5

A. Congress and this Court have recognized that racial discrimination threatens the government's substantial interest in ensuring the orderly flow of commerce. 5

B. Section 2(a) advances the government's substantial interest in ensuring the orderly flow of commerce. 12

1. Section 2(a) is a content neutral regulation of commercial speech. 13

2. Being denied federal registration has not prevented Tam from continuing to use a racial slur for his band's name. 19

3. The cancellation of the REDSKINS trademark registration illustrates the importance of Section 2(a). 21

Conclusion 30

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Bolger v. *Youngs Drug Prods. Corp.*,
463 U.S. 60 (1983) 12

Broadrick v. *Oklahoma*,
413 U.S. 601 21

Cent. Hudson Gas & Elec. Corp. v. *Pub. Serv. Comm'n of New York*,
447 U.S. 557 (1980) 12

City of Erie v. *Pap's A.M.*,
529 U.S. 277 (2000) 14, 15

City of Renton v. *Playtime Theatres, Inc.*,
475 U.S. 41 (1986) 14

Friedman v. *Rogers*,
440 U.S. 1 (1979) 12, 13

Heart of Atlanta Motel, Inc. v. *United States*,
379 U.S. 241 (1964) 7, 10

In re Tam,
808 F.3d 1321 (Fed. Cir. 2015) 10

Jones v. *City of Boston*,
738 F. Supp. 604 (D. Mass. 1990) 28

Katzenbach v. *McClung*,
379 U.S. 294 (1964) 8

Lyng v. *UAW*,
485 U.S. 360 (1988) 29

Ohralik v. *Ohio State Bar Ass'n*,
436 U.S. 447 (1978) 16

Osborne v. *Ohio*,
495 U.S. 103 (1990) 14

Ostergren v. *Cuccinelli*,
615 F.3d 263 (4th Cir. 2010) 17

Posadas de Puerto Rico Assocs. v.
Tourism Co. of Puerto Rico,
478 U.S. 328 (1986) 16

Pro-Football, Inc. v. *Blackhorse*,
112 F. Supp. 3d 439 (E.D. Va. 2015) 29

R.A.V. v. *City of St. Paul*,
505 U.S. 377 (1992) 17

Regan v. *Taxation With Representation*
of Wash.,
461 U.S. 540 (1983) 29

Regents of Univ. of Cal. v. *Bakke*,
438 U.S. 265 (1978) 17

Sambo's Rests., Inc. v. *City of Ann*
Arbor,
663 F.2d 686 (6th Cir. 1981) 16, 17

Sorrell v. *IMS Health Inc.*,
564 U.S. 552 (2011) 14

Specialized Seating, Inc. v. *Greenwich*
Indus., L.P.,
616 F.3d 722 (7th Cir. 2010) 20

Turner Broad. Sys., Inc. v. *F.C.C.*,
512 U.S. 622 (1994) 15

Va. State Bd. of Pharmacy v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 13

Volkswagenwerk Aktiengesellschaft v. *Wheeler*, 814 F.2d 812 (1st Cir. 1987) 20

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 13, 14

Ysursa v. *Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) 29

OTHER CASES

In re Johnson, 71 Wash. 2d 245 (1967) 10

FEDERAL STATUTES

15 U.S.C. 1052 16

15 U.S.C. 1125(a) 20

15 U.S.C. 1127 ..... 12, 15

42 U.S.C. 2000a ..... passim

42 U.S.C. 2000e-3(b) 9

42 U.S.C. 3604(c) 9

OTHER STATUTES

Wash. Rev. Code § 49.60 7

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Fight over Florida gun store's 'Muslim free zone' is far from over (Dec. 5, 2015), http://wjhl.com/2015/12/05/fight-over-florida-gun-stores-muslim-free-zone-is-far-from-over/ 11

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INTEREST OF AMICI CURIAE[1]

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center"), Hispanic National Bar Association ("HNBA"), National Asian Pacific Americans Bar Association ("NAPABA"), National Bar Association ("NBA"), National LGBT Bar Association ("LGBT Bar"), and National Native American Bar Association ("NNABA"), respectfully submit this brief in support of the petitioner, Michelle Lee.

The Korematsu Center is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu who defied military orders during World War II that led to the internment of 110,000 Japanese Americans, and later became an advocate for the civil rights of other victims of excessive government action. The Korematsu Center has a strong interest in ensuring that our courts, laws and government do not become active participants in perpetuating discrimination. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

HNBA comprises thousands of Latino lawyers, law professors, law students, legal professionals,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters evidencing the parties' blanket consent to the filing of *amicus* briefs have been filed with the clerk.

state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents.

NAPABA is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 50,000 attorneys and approximately 75 national, state, and local bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. Since NAPABA's inception in 1988, it has promoted justice, equity, and opportunity for Asian Pacific Americans as the national voice for Asian Pacific Americans in the legal profession. These efforts have included civil rights advocacy on various fronts. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans, NAPABA seeks to ensure that the government does not become a partner in advancing harmful racial slurs.

NBA is the nation's oldest and largest national network of predominantly African-American attorneys and judges in the United States. The NBA was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association, did not admit African-

American attorneys. Throughout history, the NBA consistently has advocated on behalf of African Americans and other minority populations. The NBA represents approximately 66,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

LGBT Bar is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity. This case stands to impact our membership both professionally and personally. Our members are of all different races, ethnicities, and religious affiliations. We see this intersectionality of our members every day, and fear a detrimental impact should the respondent be successful in this case.

NNABA is the oldest and largest association of predominantly Native American attorneys in the United States. Founded in 1973 when the first group of Native American attorneys was entering the legal profession, NNABA represents the interests of approximately 2,700 Native American attorneys. NNABA's core mission since its inception has been to promote the development of Native American attorneys who share the communal responsibility of advancing justice for Native Americans. NNABA seeks to ensure that the government does not become a partner in advancing harmful racial slurs.

SUMMARY OF ARGUMENT

Amici know all too well what it means to be excluded from full participation in society. When this exclusion is committed by a private individual or entity, we can explain to our children that these are actions by private actors and we can even see if there is recourse to federal, state, and local laws that might provide some relief. But when the government itself participates in the exclusion by conferring benefits to private actors, we are at a loss as to what to tell our children. Private acts and expressions of racism can be terrible and damaging, but they take on a wholly different meaning and are particularly corrosive to our ideal of an integrated society when they occur with the sanction of government.

Simon Tam would have this Court believe that this case is about political speech—that his re-appropriation project is about "taking on/back" a derogatory term that has been used to demean those of Asian American descent. But that is not what this case is about. This case is about a trademark. To put a more fine point on it: this case is about the registration of a trademark.

Trademarks, by their very nature, propose a commercial transaction that identifies the source of goods or services being offered. It is precisely because of their commercial nature that Congress has authority to regulate the trademark registration system. In doing so, Congress seeks to both protect consumers and to ensure the orderly flow of commerce. But marks that disparage do not further either of these goals. In fact, they do the opposite by discouraging consumers from full market

participation. As this Court well remembers, racial discrimination has a depressing effect on the economy. Thus, while the REDSKINS may be a professed homage to the noble savage for some, it is a painful reminder for Native Americans of their place in American society. *The Slants* is no better. While empowering to a young social justice rock band, that same mark may be debilitating for those who remember life in American internment camps during World War II. At its core, Section 2(a) does not operate as a ban on certain types of speech, but rather a mechanism for dealing with the harmful effects of racial, national origin, and religious discrimination on interstate commerce.

There can be no doubt that even without registration, Simon Tam can still use his mark and his music to "take on" stereotypes about Asian Americans. But what he cannot do is use the government's resources to prevent others from fully participating in the American marketplace. Reversing the decision below would prevent the trademark registration program from transforming what is clearly commercial speech into something more. But it surely will not prevent Mr. Tam from continuing his re-appropriation project.

ARGUMENT

A. Congress and this Court have recognized that racial discrimination threatens the government's substantial interest in ensuring the orderly flow of commerce.

Not too long ago—in fact, within the lifetime of our country's President—businesses were allowed to

freely express racially discriminatory commercial messages. Signs like "WHITE ONLY" affixed outside a business's entrance were not uncommon. In the Southwest, before entering a business one might read a sign that read "NO DOGS NEGROS MEXICANS." In other parts of the country, some businesses discriminated against Native Americans ("NO BEER SOLD TO INDIANS"), and others targeted Filipinos ("POSITIVELY NO FILIPINOS ALLOWED").

The deleterious effects of racism on commerce and individual dignity have been undisputed for the past half-century. Laws banning discrimination in public accommodations, such as Title II of the Civil Rights

Act of 1964[2] and Washington state's Law Against Discrimination,[3] were enacted "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[4] These laws were enacted to ensure that state power to regulate commerce was used to combat the effects of racial discrimination, not profit from them.

Title II's legislative history reveals that Congress's primary intent in enacting the law was to address the deleterious effects of racism on commerce and personal dignity.[5] As this Court explained in upholding Title II, the congressional record is "replete with testimony of the burdens placed on interstate commerce by racial discrimination." *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964). The Court also cited "many references" to racial discrimination causing "a depressant effect on general business conditions in the respective communities," noting that this discrimination "deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be

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[2] 42 U.S.C. 2000a.

[3] Wash. Rev. Code § 49.60.

[4] *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16-17 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370); Wash. Rev. Code § 49.60.010 (recognizing that race and sexual orientation discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state").

[5] S. REP. NO. 88-872, at 16-17 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370.

reluctant to establish there." *Id.* at 300. The Court thus found "ample basis" to conclude that commerce was adversely "obstructed" "because of [racial] discrimination." *Id.*

As Martin Luther King, Jr. explained in his *Letter from a Birmingham Jail*, racism in commerce inflicts a devastating toll on people of color, who have to explain to their children why they are being treated differently:

> [Y]ou suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year old daughter why she cannot go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky . . . .[6]

The corrosive impacts of racial discrimination are not limited to conduct in the public accommodations context. Discriminatory *speech* in commerce can have similar impacts. That is why, for example, Title VIII of the Civil Rights Act prohibits advertisements that communicate a discriminatory preference. See 42 U.S.C. 3604(c) (unlawful to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or

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[6] Martin Luther King, Jr., *Letter from a Birmingham Jail* 6-7 (Apr. 16, 1963), *reprinted in* WHY WE CAN'T WAIT 76 (1964).

discrimination based on race, color, religion, [or] sex"). And Title VII places similar restrictions on job advertisements. See 42 U.S.C. 2000e-3(b) (unlawful "to print or publish . . . any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin").

Back in the 1960s, in a not-so-distant echo of the arguments being raised in this case, defenders of racial discrimination challenged state and federal laws banning discrimination in commerce under the First Amendment. But none of those challenges succeeded, and by 1964 "the constitutionality of such state statutes [stood] unquestioned."[7]

Dissenting in the opinion in this case below, Judge Reyna poses the hypothetical of a restaurant named "Spics Not Welcome." If the restaurant nevertheless served Latinos, it presumably would not be in violation of Title II. Yet he notes that "[t]he mere use of the demeaning mark in commerce communicates a discriminatory intent as harmful as the fruit produced by discriminatory conduct." *In re Tam*, 808 F.3d 1321, 1380 (Fed. Cir. 2015) (Reyna, J., dissenting), cert. granted sub nom., *Lee* v. *Tam*, No. 15-1293, 2016 WL 1587871 (U.S. Sept. 29, 2016). Judge Reyna is right.

Unfortunately, these examples are not anachronisms or implausible hypotheticals. Recently, gun shops in several states have placed

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[7] *Heart of Atlanta*, 379 U.S. at 259-60 & n.8 (listing states); see also *In re Johnson*, 71 Wash. 2d 245 (1967) (rejecting constitutional challenges to Washington's statute).

signs on their stores that proclaim that the stores are "Muslim Free Zone[s]."

The owner of one of the stores, Florida Gun Supply, states, "My goal is to make sure they don't feel welcome here so I don't have the need to discriminate in the first place."[8] In this way, the owner is able, through commercial speech, to accomplish that which he could not do through direct denial of service.[9]

The businesses that put up these signs accomplish exactly what they set out to do: they erect, through commercial speech, a discriminatory wall that shuts

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[8] *Fight over Florida gun store's 'Muslim free zone' is far from over*, WJHL.COM (Dec. 5, 2015), http://wjhl.com/2015/12/05/fight-over-florida-gun-stores-muslim-free-zone-is-far-from-over/.

[9] In a similar fashion, an Indiana legislator conceded that Indiana's Religious Freedom Restoration Act would permit businesses to put up signs that say "No Gays Allowed." Adalia Woodbury, *Indiana Lawmaker Admits "No Gays" Signs Will Be Allowed*, POLITICUSUSA (Mar. 30, 2015), http://www.politicususa.com/2015/03/30/connecticut-state-boycottindianas-rfra.html.

off commerce to a class of individuals on the basis of their race, national origin, or religion. In other words, they accomplish through commercial speech precisely what the Civil Rights Act was designed to root out.

The elders in *amici*'s respective organizations are all too familiar with confronting signs that marked certain parts of the marketplace as being off limits to them and their children. *Amici* have worked too hard to fight for and win the right to fully participate and enjoy the fruits of a desegregated marketplace.

But under the theory espoused by the decision below, blatantly discriminatory signs could not be denied federal registration under the Lanham Act. In fact, if the decision below stands, "Spics Not Welcome" could become a federally protected trademark. And if that happens, the Latino father—like the black father described in Dr. King's letter—would have to explain to his daughter, "tongue twisted and [his] speech stammering," why these signs are not only allowed in modern-day America, but also coated with the legitimacy of a federally approved trademark.

B. Section 2(a) advances the government's substantial interest in ensuring the orderly flow of commerce.

"The intent of [the Lanham Act] is to regulate commerce[.]" 15 U.S.C. 1127. Trademarks are "a form of commercial speech and nothing more." *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979). Trademarks are used to "propos[e] a commercial transaction" by identifying the source of goods or

services. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980).

Because trademarks are commercial speech, the government can deny or cancel registration if doing so advances a substantial government interest, such as the orderly flow of commerce. See *id.* at 564. By that standard, Section 2(a) easily passes constitutional muster because it is a content neutral regulation that promotes the orderly flow of commerce.

1. *Section 2(a) is a content neutral regulation of commercial speech.*

i. The government can regulate trademarks to promote the orderly flow of commerce because "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983). That is why the government can ban deceptive trademarks. *Friedman*, 440 U.S. at 13. And it is precisely because trademarks are commercial speech and the government has a substantial interest in "insuring that the stream of commercial information flow[s] cleanly as well as freely," *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976), that the government can set up a federal trademark registry in the first place.

At its core, a trademark restricts other commercial speech by ensuring that certain speakers

have a limited monopoly over the use of a particular message. That is the essence of a trademark.[10]

ii. But the same interest that gives rise to the government's power to register trademarks—the orderly flow of commerce—also allows the government to regulate trademarks. And that is why Section 2(a) is content neutral. The "principal inquiry" for determining whether a law is content neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). In other words, in determining whether a law is content neutral, "[t]he government's *purpose* is the controlling consideration." *Id.* (emphasis added). See also *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 566 (2011) (*Ward* test applies to commercial speech).

In *Ward*, the Court upheld restrictions on sound amplification at an outdoor bandshell, because the "[t]he principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the [adjacent] Sheep Meadow and its more sedate activities." 491 U.S. at 791. The Court made clear that a regulation that "serves purposes unrelated to the content of expression is deemed

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[10] The decision below erroneously conflates commercial and political speech, reasoning that if a trademark has any relation to a political message, it must be afforded full First Amendment protections. But that simply creates a giant loophole to the rule that commercial speech is treated differently, and would open the door to companies adopting quasi-political messages to avoid the regulations (e.g., against deceptive advertising) that would normally apply only to commercial speech.

neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 791-92.

Ward built off the Court's decision in *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The regulation at issue in Renton explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the content of their movies. *Id.* at 44. Nevertheless, the Court treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. *Id.* at 48. See also *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 296 (2000) (concluding that a regulation is "still properly evaluated as a content-neutral restriction" if the government's "interest" is in "combating the secondary effects . . . unrelated to the suppression of the [message]"); *Osborne* v. *Ohio*, 495 U.S. 103, (1990) (regulating private speech associated with child pornography given the secondary effects of the speech). Taken together, even if a regulation implicates content, that regulation is still subject to intermediate scrutiny so long as the government's purpose is to address the secondary effects of the speech.

Here, the government's purpose under Section 2(a) is not to suppress speech, but to ensure the orderly flow of commerce. See 15 U.S.C. 1127 ("The intent of this chapter is to regulate commerce[.]"). Racially discriminatory commercial speech disrupts the orderly flow of commerce to a substantial degree. The purpose of Section 2(a) is to ward off those secondary effects, an interest which is

unrelated to the suppression of any speech. That is why Congress passed—and this Court has repeatedly upheld—laws like the Civil Rights Act.

Thus, under Section 2(a), the government's concern is not whether it approves of the message conveyed by a particular mark, but whether a particular mark disrupts commerce by, for example, inciting racial hatred or inflicting dignitary harm. In effect, Section 2(a) is a rather quotidian time, place, and manner restriction, similar to laws regulating adult businesses,[11] or laws regulating speech because of its secondary effect on commerce.[12]

In addition to prohibiting registration of marks which may disparage institutions or groups, Section 2(a) also prohibits registration of marks that are likely to cause confusion among consumers, implicate their privacy interests, or are otherwise misleading or deceptive—all things likely to harm consumers or impact their ability and desire to participate fully in commerce. See 15 U.S.C. 1052.

Just like marks that confuse or mislead consumers, or marks that invade consumer privacy, marks that disparage individual or group identities have the effect of decreasing full consumer participation in commerce while also sending the message that the government is a participant in endorsing, advancing, and promoting that behavior.

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[11] See, *e.g.*, *Pap's A.M.*, 529 U.S. 277 (2000) (upholding ban on fully nude dancing).

[12] See, *e.g.*, *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 647 (1994) (affirming F.C.C.'s must-carry regulations because they furthered the substantial government interest in "protecting noncable households from loss of regular television broadcasting service" (citation omitted)).

Section 2(a) alleviates these harms and directly advances the government's interests in distancing itself from racial discrimination thereby discouraging the perpetuation of racial discrimination in commerce and encouraging full participation by all consumers in commerce.[13] A number of commercial speech cases have recognized substantial interests that are unavoidably entangled with government disapproval of a certain message.[14] Here, Section 2(a)'s primary purpose of ensuring the orderly flow of commerce also coincides with the government's substantial interest in discouraging racial, social, and religious discord.[15]

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[13] See *Sambo's Rests., Inc.* v. *City of Ann Arbor*, 663 F.2d 686, 695 (6th Cir. 1981) (noting that "racial harmony and equality is a substantial state interest").

[14] See, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (discouraging gambling); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 466-67 (1978) (regulating in-person attorney solicitation).

[15] See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 395 (1992) (recognizing that "help[ing] to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish" is a compelling state interest); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 396 (1978) (Marshall, J., concurring) ("In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order."); *Ostergren* v. *Cuccinelli*, 615 F.3d 263, 277 (4th Cir. 2010) ("[A]lthough a state government might practice racial discrimination for decades—and many have—we would not therefore be barred from considering racial equality a state interest of the highest order." (citing *Bakke*, 438 U.S. at 396)); *Sambo's Rests., Inc.*, 663 F.2d at 695.

Because the government's interest is not to suppress speech but to promote the orderly flow of commerce, Section 2(a) is content neutral.

iii. The importance of this interest is perhaps best evidenced by the policies implemented by the U.S. Board of Geographic Names.[16] Dead Negro Draw, Texas, ostensibly honors black soldiers who died during a battle, except that until the U.S. Board of Geographic Names intervened, it was called Dead Nigger Creek on federal maps.[17] Over 30 place names in America were originally called "Niggerhead" on federal maps, but most of those names were changed to swap out "Nigger" for Negro, such as Negro Ben Peak, Arizona—"named after a miner known as 'Nigger Ben McClendon.'"[18]

As late as 1974, there were 200 place names on federal maps that still referenced "Japs," and even today there are 30 places on federal maps named "Chinaman."[19] And until last year, a lake and creek in Washington were called Coon Lake and Coon Creek, respectively, on federal maps.

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[16] Donald J. Orth & Roger L. Payne, *Principles, Policies, and Procedures: Domestic Geographic Names*, U.S. BD. OF GEOGRAPHIC NAMES 21-22 (1997), http://geonames.usgs.gov/docs/pro_pol_pro.pdf.

As discussed above, Title II of the 1964 Civil Rights Act is another strong example of the government disavowing harmful racial discrimination in commerce.

[17] Jennings Brown, Tal Reznik, & Matan Gilat, *Racial Slurs Are Woven Deep Into The American Landscape*, VOCATIV (Oct. 29, 2015), http://www.vocativ.com/news/244179/racial-slurs-are-woven-deep-into-the-american-landscape/.

[18] *Id.*

[19] *Id.*

It goes without saying that a black family would be reticent to visit a place called Niggerhead. Just like a Japanese mother is unlikely to take her son to a park called Jap Point. And those feelings were made all the worse because until relatively recently the federal government approved those names and published them on its maps.

This shows that when the government creates programs like the federal trademark registry or publishes maps, it may decline to allow others to use the programs in a manner that contributes to discrimination. Of course, individuals are free to call these locations whatever they want—just like they are free to use whatever trademark they want—but the government is under no obligation to help spread hatred, given the effects it has on commerce.

2. *Being denied federal registration has not prevented Tam from continuing to use a racial slur for his band's name.*

Amici are all too familiar with the sting of slurs such as "slant," "chink," "gook," "sand nigger," and the like. These taunts are not limited to the schoolyard. Racial slurs and epithets often accompany racialized violence. In 1982, a white Detroit autoworker called Vincent Chin a "Chink" and "Nip" before beating Chin to death with a baseball bat. In 1992, Luyen Phan Nguyen was killed in Coral Springs, Florida, by a group of white men who followed Nguyen from a party after Nguyen objected to the use of a racial slur. In 2001, Balbir Singh Sodhi was killed in Mesa, Arizona, by a gunman who had been overheard previously at a bar saying he wanted to kill "ragheads."

Simon Tam has used a racial slur as his band's name since 2006. This usage has created a protectable trademark and he could enforce his common law rights in federal court. This usage persisted even after his application for federal registration was denied in 2013. The denial of registration has not prevented him from continuing his proclaimed project to re-appropriate or reclaim this racial slur. [20] There is no extraneous consequence to a mark owner who uses a trademark that the federal government refuses to register. Mr. Tam can still call his band *The Slants*, and still register any other trademarks he wishes (so long as those trademarks independently qualify). In fact, Mr. Tam could still use the Lanham Act's other provisions to enforce his trademarks, registered or not.[21]

Put differently, engaging in speech that the government refuses to register as a trademark does not disqualify Mr. Tam from using the Lanham Act to register and enforce other trademarks, or even to enforce unregistered ones (like *The Slants*).[22] It is

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[20] Reclamation projects sometimes fail spectacularly. Commenting on comedian Trevor Noah's failed attempt to reclaim the slur "kaffir," Kagiso Lediga said, "It was well spirited, and it came from a good place, trying to make it into a good word. But leave it alone." Norimitsu Onishi, *Jail Time for Using South Africa's Worst Racial Slur?*, N.Y. TIMES (Oct. 27, 2016), http://www.nytimes.com/2016/10/28/world/africa/south-africa-hate-speech.html?_r=0.

[21] See 15 U.S.C. 1125(a).

[22] See, *e.g.*, *Specialized Seating, Inc.* v. *Greenwich Indus., L.P.*, 616 F.3d 722, 728 (7th Cir. 2010) (noting that cancellation of registration "does not affect the mark's validity, because a trademark need not be

simply a narrow limitation on Mr. Tam's ability to force the government to publish this one mark in the federal register.

3. *The cancellation of the* REDSKINS *trademark registration illustrates the importance of Section 2(a).*

Race still matters in this country. For many, that is not an easy concept to accept, given how far removed we are from the Trail of Tears, slavery, and Jim Crow. But the vestiges of racism are all around us. This case is just one example.

There are others, too. One of the most visible examples of a racist trademark is the one used by the WASHINGTON REDSKINS football team. For decades this team has called itself by a racial slur, and until recently that slur had a federal seal of approval in the form of a registered trademark. But recently, the government decided to cancel the registration of several of the team's trademarks, finally recognizing what so many already knew: that the term redskin is a racial slur, and should never have been allowed into the federal registry. The issue is currently before the Fourth Circuit. As applied to the particular trademarks at issue in the two cases, the question there is the same as the one presented here: whether the government can, consistent with the First Amendment, refuse to register a racially disparaging trademark. Here, however, the court below imposed the far more sweeping remedy of

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registered to be enforceable"); *Volkswagenwerk Aktiengesellschaft* v. *Wheeler*, 814 F.2d 812, 819 (1st Cir. 1987) ("[T]he cancellation of a trademark registration does not extinguish common law rights that registration did not create.").

facial invalidation of a federal statute. Applying such "strong medicine," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613, the *en banc* Federal Circuit essentially held that *no* trademark—no matter how offensive or denigrating to racial groups, can be refused the benefits that accompany federal registration.

The REDSKINS example informs how the Court should approach this case. Even if the Court were to decide that Section 2(a) is unconstitutional as applied to Mr. Tam, it should not find Section 2(a) unconstitutional on its face. The REDSKINS trademark is perhaps the foremost example of the impact that a racially disparaging trademark has on commerce. The mark is known worldwide, and its use pervades every corner of our society. As the REDSKINS case shows, this provision stands as an important bulwark against a flood of racially discriminatory marks that would severely and negatively affect commerce, particularly for people of color.

Amici use the REDSKINS example in this brief to show the Court that the government can, consistent with First Amendment principles, cancel or refuse to register a racially disparaging trademark given the substantial interest in an orderly flow of commerce. The REDSKINS case exemplifies the magnitude of impact that disparaging marks can have on commerce, and it shows why we still need Section 2(a).

i. For centuries Native Americans[23] have been arguably the most marginalized group in the United States. While the efforts of other racial groups to overcome their respective marginalization are far from over, in some ways the Native American community is still just beginning. Among major ethnic and racial groups in America, Native Americans rank at or near the bottom in income per capita, high school graduation rates, and political representation, and suffer from the highest poverty and unemployment rates. The child born in America with the lowest probability of ever achieving self-determination is the Native American child. And unfortunately that statement has been true for a very long time.

It is against this historical backdrop of marginalization that a $2.85 billion professional sports team has proudly used a racial slur against Native Americans as its team name. The word "redskins" was around long before Pro-Football, Inc. ("PFI" or the "Team") adopted it as its name, logo, and mascot. But it has always been clear that the term has been used to dehumanize a group of human beings living in America.

Like calling African Americans "niggers" and Latinos "spics"—words that long ago fell out of favor in common lexicon precisely because of their negative effects on those groups—Native Americans have suffered the indignity of being called "redskins" by

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[23] *Amici* use the term Native Americans throughout this brief to refer interchangeably and collectively to American Indian, Alaska Native, and Native Hawaiian peoples.

those who would diminish their humanity.[24] The main difference, however, is that Native Americans *continue* to suffer this indignity in the common lexicon. PFI would never call itself the "Washington Spics," and then have the audacity to argue that doing so is okay because there is no proof that a "substantial composite" of Latinos find that term offensive. Nor would the National Football League ("NFL") permit such a name—it penalizes use of racially derogatory language on the field as unsportsmanlike conduct.[25]

ii. The term "'redskin' was first used as a reference to American Indian people at a time when [they] were hunted for bounty and a price was paid for a red skin."[26] It is "to Indian people what 'nigger' is to African Americans."[27]

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[24] *Amici* recognize the odious, abhorrent, and offensive nature of these racist slurs, even when they appear in a legal brief that describes their harm and repudiates them. Nevertheless, *amici* use the slurs themselves, rather than their abbreviations, not to be incendiary or exploitative, but to demonstrate a point: as a society, we are far more uncomfortable with certain slurs, such as those that discriminate against African Americans and Latinos, whereas the slur against Native Americans is almost quotidian.

[25] Roger Goodell, *2016 Official Playing Rules of the National Football League*, NFL 54-55 (2016), http://operations.nfl.com/ media/2224/2016-nfl-rulebook.pdf; see also Jonathan Jones, *Foul Language: The NFL is cracking down on the use of the N-word on the football field*, SPORTS ILLUSTRATED (Oct. 26, 2016), http://www.si.com/nfl/2016/10/26/nfl-n-word-penalty-unsportsmanlike-conduct (describing the NFL's recent history of imposing 15-yard penalties on players who use the n-word).

[26] Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 912 n.64 (1999) (quoting Letter from Lawrence R. Baca, Chairman, Indian Law Section of the Federal Bar Association, to John Hope

It is unlikely that when the Team adopted the name "redskins" in 1932 that it was doing so as an homage to Native Americans, and far more likely that it reflected racial animus. In fact, the next year the Team's owner, "George Preston Marshall instituted what would become a 13-year league-wide ban on African-American players from the NFL."[28] And, as the rest of the NFL integrated in response to the Civil Rights Movement, the Team remained the last holdout, clinging to segregation until the bitter end.

It took 30 years—until 1962—for the Team to integrate and finally accept its first non-white players, the last NFL team to do so. But not because the Team suddenly changed its mind about racial discrimination: "[i]n contrast to other N.F.L. owners, [Team owner] Marshall 'did not pretend there were no blacks good enough to make his team,'. . . 'he was honest enough to admit that he simply didn't want them around.'"[29]

Franklin, Chairman, President's Advisory Board on Race Relations 2 (June 30, 1997) (on file with Harvard Law School Library)) (HEREINAFTER "*Indian Team Names*").

[27] *Id.* at 912 n.65 (quoting Lawrence R. Baca, What About the Indian Country "N" Word? 2 (Nov. 17, 1998) (unpublished manuscript) (on file with Harvard Law School Library)).

[28] *Ending the Legacy of Racism in Sports & the Era of Harmful "Indian" Sports Mascots*, NAT'L CONG. OF AM. INDIANS 2 (Oct. 2013), http://www.ncai.org/attachments/PolicyPaper_mijApMoUWDbjqFtjAYzQWlqLdrwZvsYfakBwTHpMATcOroYolpN_NCAI_Harmful_Mascots_Report_Ending_the_Legacy_of_Racism_10_2013.pdf.

[29] Ryan Basen, *Fifty Years Ago, Last Outpost of Segregation in N.F.L. Fell*, N.Y. TIMES (Oct. 6, 2012),

In fact, and particularly relevant here, the reason the Team desegregated and began signing non-white players was because "[t]he Redskins were preparing to move into a new stadium being built on federally controlled land affiliated with the national parks system," and the government stipulated that the Team had to integrate to use the new stadium.[30] In other words, for the sole purpose of taking advantage of a discretionary federal benefit, did the Team finally integrate. And even then, only begrudgingly as the Team's owner lamented that "the government had the right to tell a showman how to cast the play."[31]

Half a century later, the Team's decision to cling to its racist name is consistent with its discriminatory past. But this time, the Team wants to bootstrap its racist name to another discretionary federal program: the trademark registry.

iii. The government's decision to decline to register racist slurs makes sense for all the same reasons that the government regulates discrimination in public accommodations and geographic place names—because the harms of disparagement in commerce are real. "Indian team names and mascots in particular have been charged with fostering 'racial stereotyping,' causing low self-esteem amongst American Indians, and setting up

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http://www.nytimes.com/2012/10/07/sports/football/50-years-ago-redskins-were-last-nfl-team-to-integrate.html.

[30] *Id.*

[31] *Id.*

Indian children as targets for physical harassment by their peers."[32] And that's not all:

> The studies suggest that American Indian mascots have harmful psychological consequences for the group that is caricaturized by mascots. This is true whether . . . the mascot represented an American Indian university, a mainstream university, or a professional sports team.
>
> . . . .
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> American Indian mascots thus remind American Indians of the limited ways in which others see them. Moreover, because identity construction is not solely an individual process (i.e., you cannot be a self by yourself), the views of American Indians held by others can also limit the ways in which American Indians see themselves.[33]

The bombardment of slurs has a lasting negative effect on Native Americans, not only "threaten[ing] the psychological functioning of American Indians" but also "facilitating the expression of discriminatory and explicitly racist attitudes toward American

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[32] *Indian Team Names*, supra n.26, at 911 (footnotes omitted).

[33] Stephanie A. Fryberg, et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED SOC. PSYCHOL. 208, 216 (2008).

Indians" by non-Native people. [34] As Professor Steinfeldt explained to Congress:

> Having a cultural icon like Chris Berman provide colorful commentary on Washington's pro football team doesn't mean that such a hateful racial [epithet] (i.e., Redskin) doesn't hurt people—rather, it means that the people using this hateful term have become desensitized to the fact that they are hurting people with their historical tradition of dishonor. Despite how members of mainstream society want to frame the issue, this is NOT an issue of mere sensitivity, offensiveness, or "political correctness." Rather this is an issue involving oppression, stereotyping, and inflicting psychological harm[.][35]

Indeed, the human costs of racism that Dr. King described are not limited to those contexts where an accommodation is denied. If a hotel clerk begrudgingly accepts African-American and Native American patrons, but calls each one a "nigger" and

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[34] *Stolen Identities: The Impact of Racist Stereotypes on Indigenous People: Hearing Before the S. Comm. on Indians Affairs* 112th Cong. 69 (2011) (prepared statement of Jesse A. Steinfeldt, Assistant Professor, Indiana University-Bloomington).

[35] *Id.*; see also *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations*, AM. PSYCHOLOGICAL ASS'N (2005), http://www.apa.org/about/policy/mascots.pdf (citing many studies finding psychological harm of exposure to negative stereotypes).

a "redskin," those harms are not cut off at the front desk; a father is still left with the unenviable task of explaining to his daughter, "tongue twisted and [his] speech stammering," why a business is permitted to register those terms and why they are still accepted as normal parlance in 2016.[36] Likewise, if hotels (and sports teams) admit minorities, but use names like "Redskins Inn," "Nigger Inn," or "Spic Inn"—and even get such names federally registered as trademarks—the impact is similar to a denial of public accommodations.

iv. Given this history, the government finally canceled the registration of several of the Team's trademarks, correctly finding that they are racist and contrary to the government's interest in promoting orderly and non-discriminatory commerce. *Pro-Football, Inc.* v. *Blackhorse*, 112 F. Supp. 3d 439, 461 (E.D. Va. 2015).

Canceling registration of the REDSKINS trademark did not restrict PFI's speech. The Team can still sell hats, jerseys, and footballs bearing its racist name. Cancellation simply means the government will not affirmatively allow its own program to be used to endorse, promote, or subsidize PFI's ability to capitalize on its mark. This Court has repeatedly held that the government can decline to subsidize

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[36] *See Jones* v. *City of Boston*, 738 F. Supp. 604, 605 (D. Mass. 1990) (noting that calling patron a "nigger" at a bar—despite serving him—still satisfies the Title II requirement "of showing that he was denied equal access to a place of public accommodation on the basis of race" because "[t]he term 'nigger' is intimidating by its very nature").

certain speech.[37] That is especially true in the commercial context where the government has a substantial interest in promoting a non-discriminatory flow of commerce.

But the decision below creates a world where "Spics Not Welcome" and "Muslim Free Zone" could be registered as federal trademarks, and the WASHINGTON REDSKINS could remain a federally registered trademark. And so, should the decision below stand, the Native American father must still explain to his daughter why it remains acceptable for others to think nothing of calling their people "redskins" on SportsCenter, and why the federal government has approved and endorsed the use of its ® next to a slur and done nothing to distance itself from such racial discrimination.

We have come too far to take such a big step back.

CONCLUSION

Refusing federal registration of Simon Tam's disparaging mark may not eliminate the derogatory term from the American lexicon. Indeed, it will not deter Simon Tam from using the term for his re-

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[37] See *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." (citation and quotation marks omitted)); *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) ("[T]he State's decision not to [provide deductions for union dues] is not an abridgment of the unions' speech; they are still free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor."); *Lyng* v. *UAW*, 485 U.S. 360, 366 (1988) (rejecting First Amendment challenge to law barring certain workers who are on strike from receiving food stamps).

appropriation project. But these facts should not prevent the government from refusing to use its resources for activity that deters rather than promotes commerce. *Amici* respectfully request that the Court reverse the decision below.

Respectfully submitted.

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